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No. 79-900

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

FEDERAL TRADE COMMISSION, et al.,
Petitioners,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

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THE QUESTION PRESENTED

Where the statute creating the Federal Trade Commission authorizes the Commission to issue a complaint only when it makes a determination that there is reason to believe that the Federal Trade Commission Act has been violated, does a complaint for declaratory relief filed in district court by a respondent in a Commission proceeding, alleging (a) that the Commission in issuing its complaint made no determination that it had reason to believe that the respondent had violated the law and (b) that the Commission improperly based its action on extraneous political considerations, state a claim on which relief can be granted?

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BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

The decision of the Ninth Circuit holds that the complaint of Standard Oil Company of California (Socal) states a claim on which relief may be granted, and remands the case for further proceedings in the district court.[1]

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[1]The allegations of a complaint are to be liberally construed; a complaint may not be dismissed if it states a claim for relief under any set of facts that might be proved under its allegations (*Conley v. Gibson* (1957) 355 U.S. 41, 47-48).

The Ninth Circuit decision is based on allegations of a flagrant failure by the Federal Trade Commission to adhere to an explicit limitation on its authority to issue complaints embodied in its organic act. Socal's complaint alleges—with supporting detailed factual allegations (infra, pp. 3-7)—that the Commission did not make a determination of reason to believe that Socal had violated section 5 of the FTC Act, but issued its complaint in Docket No. 8934 because of extraneous political considerations unrelated to the merits of any reason to believe that Socal had violated the law.

Section 5 of the Federal Trade Commission Act provides that "[w]henever the Commission shall have reason to believe" that a violation of the Act has been or is occurring, and it appears to the Commission that a proceeding would be in the public interest "it shall issue * * * a complaint stating its charges * * *" (15 U.S.C. § 45(b)). The Ninth Circuit stated:

> "A restriction on the FTC's discretion is embodied in the very terms of 15 U.S.C. § 45(b). The FTC must first in fact make a 'reason to believe' determination that the law has been violated. See *Hunt Foods and Industries, Inc.* v. *Federal Trade Commission*, 286 F.2d 803, 806 (9th Cir.), *cert. denied*, 365 U.S. 877, 81 S.Ct. 1027, 6 L.Ed.2d 190 (1961). The restriction provides 'law to apply' in this case because Socal claims that the FTC disregarded the restriction and acted outside the terms of the statute. Socal claims that FTC complaint number 8934 was hurriedly issued with hardly any precomplaint investigation of Socal and under the pressure of outside influences. In short,

> Socal claims that the FTC did not make and, in the circumstances, could not have made the 'reason to believe' determination despite a recitation on the face of the FTC complaint that the determination had been made.
>
> "The allegations in Socal's complaint and the reasonable inferences from the allegations support Socal's claim. * * *
>
> "* * * Because FTC complaints should not issue other than as prescribed in 15 U.S.C. § 45(b), Socal's claims should be reviewed. However, we emphasize that review is limited. It cannot extend to an assessment by the district court of what constitutes 'reason to believe' but simply whether the FTC disregarded the mandate and restriction of 15 U.S.C. § 45(b) by not even making a 'reason to believe' determination at all" (J.A. 59-60).

As the Ninth Circuit observed (J.A. 59-60), Socal's claim is supported by detailed allegations in its complaint which include the following:

In December 1971, the Commission instituted an investigation (Docket No. 721-0047) to determine whether oil companies were engaging in unfair acts or practices in violation of section 5. During the next 17 months, the Commission did not examine any of Socal's officers or employees or any of its documents, books and records (J.A. 6-7).

On May 31, 1973, Senator Jackson, as Chairman of the Interior and Insular Affairs Committee of the Permanent Investigations Subcommittee of the Senate Committee on

Government Operations, and then a presidential candidate, sent a letter to Chairman Engman asking the Commission to

> "prepare a report within thirty days regarding the relationship between the structure of the petroleum industry and related industries and the current and prospective shortages of petroleum products" (J.A. 7).

The "current shortages" were the first peacetime shortages of fuel oil and gasoline in the nation's history (J.A. 5, 10).

On July 6, 1973, with no examination by the Commission staff of any Socal documents or any of its officials except for three questioned only a few days before,[2] Chairman Engman sent Senator Jackson a report captioned "Preliminary Federal Trade Commission Staff Report on Its Investigation of the Petroleum Industry," stating:

> "This report has not been evaluated or approved by the Commission, and the findings and conclusions contained in the report do not necessarily reflect the views of the Commission" (J.A. 8).

On July 9, Senator Jackson threatened to publish the Preliminary Staff Report as a congressional committee print

[2]On June 1, 1973, the Commission issued subpoenas to three officials of Socal who testified at investigatory hearings on June 26, 28 and 29 (J.A. 7). On June 27, The Evening Star and The Washington Daily News published an article with the heading "8 Oil Firms Face FTC Action." The article, based on "congressional sources," not FTC sources, stated in part: "The Federal Trade Commission is prepared to recommend antitrust action against the eight major oil firms in light of the ongoing energy shortage, congressional sources have disclosed" (J.A. 7-8). On July 6, the Commission issued a subpoena duces tecum directing Socal to produce documents (J.A. 8), but the investigation in Docket No. 721-0047 was summarily closed before any response by Socal was due (J.A. 12).

(J.A. 9). On July 11, Chairman Engman objected to such publication, stating that

> "[t]he Commission recognizes its obligation to honor the legitimate requests of congressional committees for information. Disclosure of such a document to Congress, however, must be contrasted with its public release, which the Commission views as inconsistent with its duty to proceed judiciously and responsibly in determining what, if any, action should be taken on the basis of the staff investigation" (J.A. 9).

On Friday, July 13, Senator Jackson released the Preliminary Staff Report for publication as a committee print (J.A. 9).

On Tuesday, July 17, with but one intervening business day after Senator Jackson released the report, and just after Chairman Engman's statement that the staff report had not been evaluated by the Commission and its public release would be "inconsistent with the Commission's duty to proceed judiciously and responsibly" in the premises, a Commission news release stated that it was issuing the complaint in Docket No. 8934 (J.A. 9-10).[3] On July 18 the complaint was issued bearing that date (J.A. 10).

Events after issuance of the complaint in Docket No. 8934 equally reveal that the Commission did not make a determination of reason to believe that Socal had violated section 5 (J.A.10). Such events include admissions by

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[3]The New York Times reported on March 16, 1975 after a review of events preceding issuance of the complaint in Docket No. 8934: "Once the report was out, Congressional sources other than Senator Jackson said that the commission was under great pressure to file a complaint" (J.A. 10).

complaint counsel in December 1973 and in April and May 1974 that they had no evidence to support charges of the complaint (J.A. 11-12).[4] In October 1974, in their efforts to substitute post-complaint discovery for pre-complaint investigation, complaint counsel again emphasized the problems they confronted because of the absence of a pre-complaint investigation (J.A. 13-14).[5]

The first Administrative Law Judge assigned to the case recognized that the "discovery" sought by complaint counsel in Docket No. 8934 was an improper attempt to renew a prematurely terminated Commission investigation of the oil industry (J.A. 12, 14), and certified to the Commission

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[4]Complaint counsel's inability to come forward with any evidence in support the complaint stands in sharpest contrast to the normal Commission procedure of an investigation to provide basis for a staff recommendation to the Commission with regard to possible issuance of a complaint. In July 1973, the Commission's Operating Manual provided that issuance of a complaint should not be recommended to the Commission by its staff unless it "has evidence sufficient to establish a prima facie case-in-chief in support of all of the allegations of the complaint as to each party" (§ 3.21(B)(1)). Illustration 18 to the Manual required that the staff memorandum transmitting a proposed complaint include a "[c]oncise summary of the evidence underlying each factual allegation in the complaint with citations to the location of evidence in the investigational file" (par. IV.2.).

[5]Complaint counsel were still reiterating in September 1977 their discovery problems caused by the fact that before the complaint issued, "the Commission staff did not obtain any substantive document or data discovery" from Socal or other respondents (Complaint Counsel's Motion to Commission to Modify Pending Application and Obtain Expedited Decision, Sept. 28, 1977, p. 3).

in October 1974 his suggestion that the Commission consider withdrawal of the case from adjudication "so that it may be more fully investigated without the restrictions imposed by the existing rules governing adjudicative proceedings" (J.A. 14). The Commission declined the suggestion of the Administrative Law Judge (J.A. 15), but Commissioner Dixon, now the only member of the Commission who was a member in July 1973, later publicly acknowledged that the Commission had issued its complaint in Docket No. 8934 "without being ready" (Hearings before the Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. (1976) p. 613).

Socal showed in its complaint that it had no remedy for the unlawful action of the Commission other than suit in district court (J.A. 13, 16). The Commission had denied Socal's motion to dismiss or withdraw the complaint in Docket No. 8934, refused Socal any discovery on the reason-to-believe issue, stated that the issue would not be considered in hearings in the case, and asserted that the issue was immune from judicial review "and will not be reviewed by the courts" (Commission order, June 4, 1974, J.A. 13, 47-49).[6]

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[6]The Commission acknowledged in the same order that it had received communications from members of Congress before it issued the complaint, and offered the self-serving assurance that "[n]one of the communications received by this agency from any member of Congress is even remotely of the character deemed improper by the courts" (J.A. 47-48). *No court knows what those communications were.*

The Ninth Circuit concluded that "[t]he allegations in Socal's complaint and the reasonable inferences from the allegations support Socal's claim" that the Commission had failed to ascertain the facts and make a determination of reason to believe based thereon and had unlawfully based its action on considerations irrelevant to any determination that Socal had violated the law, and that Socal's only avenue of relief was review of its claim in district court (J.A. 59-60).

SUMMARY OF ARGUMENT

Socal's complaint states a claim on which relief may be granted.

The Commission action in issuing a complaint against Socal without making a determination that there was reason to believe that Socal had violated section 5 of the FTC Act, in defiance of an express limitation on its authority, is not agency action "committed to agency discretion by law." The unreviewable power asserted by the Commission would permit it to issue a complaint for reasons having nothing to do with a violation of law and, provided only that the Commission's action was under cover of a "facially valid" complaint, no court could compel the Commission to adhere to requirements of its organic act. This Court has just reiterated, unanimously, in *Marshall* v. *Jerrico, Inc.* (1980) .... U.S. ...., 100 S.Ct. 1610, that "[i]n appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by

improper factors or were otherwise contrary to law" (100 S.Ct. 1616-1617).

The Commission's contention that its issuance of an antitrust complaint does not constitute "agency action" under the Administrative Procedure Act (APA)—a contention the Commission did not assert in its petition for certiorari but belatedly revived as the first argument in its brief on the merits—is without substance. This Court has insisted that the judicial review provisions of the APA receive a pragmatic and hospitable interpretation. The Commission action in issuing the complaint against Socal in Docket No. 8934 and the Commission order denying Socal's motion for withdrawal of the unlawfully issued complaint constitute "agency action" under the common law and the APA.

Judicial review in district court is the only adequate remedy for the Commission's issuance of a complaint without a determination of reason to believe that Socal had violated the law—a determination which is anterior to and separable from the ultimate merits of the case. Section 5 of the FTC Act specifies that review of a final Commission order in the court of appeals is directed to whether there is evidence in the record to support the Commission's findings. As the Seventh Circuit and the District of Columbia Circuit Courts of Appeals have held in *Jewel Companies, Inc.* v. *F.T.C.* (7 Cir. 1970) 432 F.2d 1155 and *Elmo Division of Drive-X Company* v. *Dixon* (D.C.Cir. 1965) 348 F.2d 342, error in complaint issuance by the Commission will not be reviewed on final appeal because at that point "the standard of review will be different" and the court of

appeals "would only decide whether the final order is supported by the evidence and would not question the authority of the Commission in issuing the complaint" (*Jewel Companies,* supra, 432 F.2d 1159).

Moreover, the protection against groundless charges and political harassment which the reason-to-believe requirement of section 5 affords would obviously be denied if unlawful complaint issuance could be challenged only at the end of the proceeding.

ARGUMENT

I. SOCAL'S COMPLAINT STATES A CLAIM FOR RELIEF; THE COMMISSION DOES NOT HAVE UNBRIDLED AUTHORITY TO ISSUE COMPLAINTS, AND MUST ADHERE TO REQUIREMENTS OF ITS ORGANIC ACT.

The Commission's announcement of a complaint against Socal and other oil companies with but one intervening business day after Senator Jackson published the Preliminary Staff Report is a striking revelation of failure to make the reason-to-believe determination required by section 5 of the FTC Act. In *Hunt Foods and Industries, Inc.* v. *F.T.C.* (9 Cir. 1961) 286 F.2d 803, 806, certiorari denied (1961) 365 U.S. 877, the court said:

> "The Commission cannot have 'reason to believe' unless it is in possession of facts warranting such a belief. It thus becomes the duty of the Commission to ascertain the relevant facts."[7]

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[7]The Commission acknowledged from its inception the statutory restriction imposed by the Congress on the issuance of complaints under section 5:

> "Reason to Believe—In view of the fact that the Commission is authorized to issue its complaint, not upon probable cause, but only upon grounds which give it 'reason to believe' that there has been a violation of the law, *the Commission is required to act, and has acted with the utmost circumspection*

As the Ninth Circuit held, Socal's allegations in the instant case support a reasonable inference that the Commission caved in to widely-publicized outcries over the first peacetime shortages of gasoline and fuel oil in the nation's history, and that the Commission could not, in the far-reaching and complex circumstances in question, have been able to ascertain the relevant facts and make a determination of reason to believe that Socal had violated section 5.

The Ninth Circuit's decision is grounded in long-established legal principles which guarantee judicial review of agency action that is contrary to statutory command or arbitrarily based on impermissible factors.[8] These princi-

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in the issuance of complaints and the institution of proceedings. In all cases it makes a thorough preliminary investigation of the matters charged in order that *no formal proceeding may be undertaken without an adequate foundation*" (FTC Annual Report, June 30, 1916, p. 6, emphasis supplied).

[8]Precedent from the inception of the Court establishes that there is no place for the Commission's assertion of unreviewable power in the face of an express limitation imposed by the Congress on the Commission's authority to issue complaints. Chief Justice Marshall put the query in *Marbury* v. *Madison* (1803) 1 Cranch. (5 U.S.) 137, 176:

> "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"

In *Yick Wo* v. *Hopkins* (1886) 118 U.S. 356, 369-379, the Court stated that "the nature and the theory of our institutions of government" do not leave room for arbitrary power; in *Garfield* v. *Goldsby* (1908) 211 U.S. 249, 262, the Court repeated that "there is no place in our constitutional system for the exercise of arbitrary power;" and in *Morgan* v. *United States* (1936) 298 U.S. 468, 480, the Court said that "circumstances must not be considered which should not legally influence the conclusion." In *FTC* v. *Universal-Rundle Corp.* (1967) 387 U.S. 244, 251, the Court stated that "the Federal Trade Commission does not have unbridled power to institute proceedings."

ples were codified in the Administrative Procedure Act in 1946. Section 706 of the APA (5 U.S.C. § 706) provides that a court *"shall"*—"hold unlawful and set aside agency action" which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or which is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." From the enactment of the APA to this date, this Court and lower courts have held that judicial review of agency action is the rule, and that the rare exception of nonreviewability must be supported by clear congressional intent.[9] And this Court and other courts have emphasized that such review may be a limited review, to correct an agency's failure to exercise its lawful discretion or set aside action which is in defiance of statutory requirement or based on impermissible considerations, without substituting the court's discretion for that of the agency:

> *Marshall* v. *Jerrico, Inc.* (1980) ..... U.S. ....., 100 S.Ct. 1610, 1616-1617 ("the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law");
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> *Dunlop* v. *Bachowski* (1975) 421 U.S. 560, 568 (courts have jurisdiction where "the Secretary has acted in an arbitrary and capricious manner by ignor-

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[9]See, e.g., *Citizens to Preserve Overton Park* v. *Volpe* (1971) 401 U.S. 402, 410-413; *Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136, 140-141; *Adams* v. *Richardson* (D.C.Cir. 1973) 480 F.2d 1159, 1161 *(en banc); Gonzalez* v. *Freeman* (D.C.Cir. 1964) 334 F.2d 570, 575 (Burger, J.).

ing the mandatory duty he owes plaintiffs under the powers granted by the Congress");

Leedom v. *Kyne* (1958) 358 U.S. 184, 188 (the court's review is "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act");

Accardi v. *Shaughnessy* (1954) 347 U.S. 260, 268 ("we are not here reviewing and reversing the manner in which discretion was exercised * * * we object to the Board's alleged failure to exercise its own discretion");

United States v. *Shaughnessy* (2 Cir. 1950) 180 F.2d 489, 491 (L. Hand, J.) (agency action may not be based on "considerations that Congress could not have intended to make relevant");

D.C. Federation of Civic Associations v. *Volpe* (D.C. Cir. 1972) 459 F.2d 1231, 1247-1248 (if the administrator "took into account 'considerations that Congress could not have intended to make relevant,' his action proceeded from an erroneous premise and his decision cannot stand");

Safir v. *Gibson* (2 Cir. 1969) 417 F.2d 972, 978 (the administrator is required to make a "considered decision" on "grounds consistent with the statute");

East Oakland-Fruitvale Planning Council v. *Rumsfeld* (9 Cir. 1972) 471 F.2d 524, 533 ("separable issues appropriate for judicial determination are to be reviewed, though other aspects of the agency action may be committed to the agency's expertise and discretion");

Littell v. *Morton* (4 Cir. 1971) 445 F.2d 1207, 1211 ("the Supreme Court has not been tolerant of agency action which it deemed to be an abuse of the discretion granted by Congress, even where the agency is vested with broad discretion");

Peoples v. *United States Department of Agriculture* (D.C. Cir. 1970) 427 F.2d 561, 567 (agency action "is subject to judicial review for arbitrariness and abuse of discretion, even though discretion may be broad");

Medical Com. for Human Rts. v. *Securities & Exch. Com'n* (D.C.Cir. 1970) 432 F.2d 659, 675, vacated as moot (1972) 404 U.S. 403 ("[l]imited and partial review to examine the legal framework within which administrative discretion must be exercised is scarcely a doctrinal innovation; it has been repeatedly sustained by the Supreme Court");

Cappadora v. *Celebrezze* (2 Cir. 1966) 356 F.2d 1, 6 ("the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion");

Chattanooga Pharm. Ass'n v. *United States Dept. of Justice* (6 Cir. 1966) 358 F.2d 864, 866-867.

A. "Prosecutorial discretion" is not here involved; Socal's claim is that the Commission failed to exercise its lawful discretion and acted for impermissible reason.

The Commission's exercise of prosecutorial discretion is not threatened in this case. Socal's claim does not challenge any judgmental or managerial decision of the Commission related to its evaluation of disputed facts or its allocation of enforcement resources. Socal's claim does not challenge the kinds of acts or practices which the Commission may consider to be in violation of section 5.

Socal's claim is that in this instance the Commission acted outside the bounds of an express statutory limitation on its authority. Prosecutorial discretion is not involved in the question whether the Commission issued the complaint in Docket No. 8934 without making the required determi-

nation of reason to believe that Socal was violating the law. The Commission either made that determination or it did not. If it did not—as Socal's claim directly alleges—then the issuance of the complaint did not satisfy the statutory requirement of section 5 and was invalid. This Court has confirmed the need to constrain, with limited judicial review and without intrusion on proper agency discretion, agency action that is in defiance of statutory requirements and arbitrarily premised on considerations that the Congress could not have intended to make relevant (see pp. 12-13, supra).

The Commission's brief fails to acknowledge the availability of limited judicial review to assure agency compliance with its statutory mandate. While we have no quarrel in the abstract with much of the general discussion in the Commission's brief—e.g., we do not deny that the Commission has broad discretion in deciding what cases to bring, or that unnecessary intrusion into the mental processes of the Commissioners is to be avoided, or that judicial review of Commission action should not interfere improperly with its responsibilities—these generalities do not meet the circumstances pleaded in Socal's complaint, which must be taken as true on motion to dismiss.

The flaw in Commission reasoning is illuminated by the following assertions in its brief:

> "Under the statute [section 5 of the FTC Act], there is no meaningful distinction between the factual allegations [in a Commission complaint] providing 'reason to believe' and the question whether a 'reason to

> believe' determination has in fact been made" (Commission brief, p. 29).
>
> "Here, the allegations in the administrative complaint constitute the Commission's 'findings' that there is 'reason to believe' that SOCAL and the other respondents in the administrative proceeding violated the law" (Commission brief, p. 45).

In asserting that if the allegations of a Commission complaint are sufficient on their face to state a claim under section 5 then the Commission has by definition made a sufficient reason-to-believe determination, the Commission confuses the process of determining whether there is any basis for allegations that respondent violated the law with the different question of whether allegations on their face state a cause of action. The Commission's assertion is that a bare *recital* of reason to believe precludes an inquiry into whether an actual determination of reason to believe was made by the Commission. It is obvious, however, that the mere making of allegations and recitals does not establish that the Commission made a determination that there were facts to warrant them.

Socal contends not that the allegations of the Commission complaint fail to state a claim on their face, but that the Commission failed to determine whether there was any factual basis for believing that Socal had violated section 5. As the Ninth Circuit held, "Socal's allegations are sufficient to raise the claim that the FTC * * * acted without deliberation as to Socal," and that there should be review in the district court of whether the Commission issued the complaint in Docket No. 8934 without "even making a 'reason to believe' determination at all" (J.A. 60).

Socal's complaint alleges that the Commission did not have before it any factual basis for determining that Socal had violated section 5. This case is entirely distinct from *United States* v. *Morgan* (1941) 313 U.S. 409 and *National Nutritional Foods Ass'n* v. *Food & Drug Admin.* (2 Cir. 1974) 491 F.2d 1141 (Commission brief, pp. 44, 47), where there were voluminous records to support the determinations of the agencies. Socal does not simply claim that the Commission acted too hastily on what it had before it. Socal does not know, nor does any court know—and the Commission asserts that no court is entitled to know—what the Commission had before it. The allegations of Socal's complaint regarding the publication of the Preliminary Staff Report by Senator Jackson's committee and the rapid sequence of events incident to the Commission's issuance of the complaint in Docket No. 8934, plus the admissions by complaint counsel thereafter of the absence of factual support for charges in the complaint, are to show that Socal has prima facie cause to seek a judicial inquiry into what the Commission actually did before it issued the complaint.

The Commission cites *Ewing* v. *Mytinger & Casselberry* (1950) 339 U.S. 594 (Commission brief, pp. 33, 41) for the proposition that "[l]ike a grand jury's finding of probable cause, an agency's reason to believe determination has no independent legal significance apart from the supporting factual allegations in the complaint," and cites *Costello* v. *United States* (1956) 350 U.S. 359 and *United States* v. *Calandra* (1974) 414 U.S. 338 for the rule that an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of "inade-

quate" or "incompetent" evidence (Commission brief, p. 34, n. 20). What is before the Court is the statutory duty of the Commission in the initiation of civil proceedings under the FTC Act, not the historical role of the grand jury in criminal proceedings, and the Commission's arguments also confuse a bona fide determination based on some evidence with a failure to make a bona fide determination at all.

Concurring in *Costello,* Justice Burton distinguished "no evidence" from "inadequate evidence," stating that "if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed," and that "I agree with Judge Learned Hand that 'if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated.' 221 F.2d 668, 677" (350 U.S. 364-365).[10]

In *United States* v. *Ciambrone* (2 Cir. 1979) 601 F.2d 616, 622, the court stated that in determining whether

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[10]Later cases carry forward the "no evidence" distinction pointed out in *Costello: United States* v. *Ciambrone* (2 Cir. 1979) 601 F.2d 616, 622; *United States* v. *Romero* (9 Cir. 1978) 585 F.2d 391, 399, certiorari denied (1979) 440 U.S. 935; *United States* v. *Briggs* (5 Cir. 1975) 514 F.2d 794, 805; *United States* v. *Tane* (2 Cir. 1964) 329 F.2d 848, 853-854; *United States* v. *O'Shea* (S.D.Fla. 1978) 447 F.Supp. 330, 332, *affirmed* (5 Cir. 1979) 588 F.2d 199; *United States* v. *Carcaise* (M.D.Fla. 1978) 442 F.Supp. 1209, 1212-1213. In *O'Shea,* supra, the court observed:

> "This is not a case which challenges an indictment because of the quality of the evidence. The problem here is that there simply is no evidence sufficient to establish probable cause that the defendant Lawson committed any one of the three offenses of which he is charged" (447 F.Supp. 332).

probable cause exists the grand jury "has the equally important duty of protecting persons against unfounded or unsupported charges and, absent a finding of probable cause, it may not file an indictment."

In *United States* v. *Carcaise* (M.D.Fla. 1978) 442 F.Supp. 1209, in dismissing an indictment the court emphasized the need for evidence as to each defendant and for time to deliberate:

> "[*W*]*ithout some reasonably careful scrutiny of each defendant's conduct, the grand jury could not have fulfilled its obligation to protect citizens against unfounded criminal prosecution and the enoromous consequences that are attendant on any criminal prosecution well-founded or otherwise.* [citing authority]
>
> "* * * This court does not know what use the grand jury made of the depositions, but it is not reasonable to assume that the grand jury, unaided by a competent expert witness, could have read and understood the 1160 pages of deposition testimony in a session of six hours and forty-five minutes a part of which was occupied by other matters" (442 F.Supp. 1213, emphasis supplied).

In the difficult and complex circumstances, and without any investigation of Socal's operations, the Commission could not have made a determination of reason to believe that Socal had violated section 5 before it rushed out the complaint in Docket No. 8934.

The *Ewing* case is otherwise not in point of present circumstances and is misleadingly characterized in the Commission's assertion that it "held that an administrative 'probable cause' determination is not judicially reviewable" (Commission brief, p. 33). The issue in *Ewing* was whether a *hearing* was a pre-requisite to a seizure of an allegedly misbranded drug (cf., *Fuentes* v. *Shevin* (1972) 407 U.S. 67, 90-92). Socal does not contend that it was entitled to a hearing before the Commission issued its complaint in Docket No. 8934; Socal contends that the Commission issued the complaint in defiance of an express statutory limitation on its authority. The Commission also does not mention that, unlike the Commission's issuance of a complaint upon its determination of reason to believe, in the mislabeled-drug setting of *Ewing*, "[w]hether a [libel] suit will be instituted depends on the Attorney General, not on the administrative agency" (339 U.S. 599). The Court reiterated in *Ewing* that "[t]he [FDA] determination of probable cause in and of itself had no binding consequence [because] * * * [i]t took the exercise of discretion on the part of the Attorney General, as we have pointed out above, to bring it into play against appellee's business" (339 U.S. 600). Moreover, in direct contrast to the instant case, there was no claim in *Ewing* that either the FDA administrator or the Attorney General had failed to exercise his discretion in making the probable cause determination.

There is no genuine risk that every respondent in a Commission proceeding will challenge the Commission's reason-

to-believe determination.[11] Socal has shown that in this instance the Commission, under pressures which are a matter of record, failed to make the pre-complaint investigation it ordinarily makes as the foundation for determining whether or not to issue a complaint. In their letter to the Solicitor General, general counsels of other agencies acknowledge that "the case admittedly arose in an unusual situation involving the FTC and congressional pressures put upon it" (Commission Pet. for Cert., Appx. F, p. 33a).

The Commission suggests that, if its issuance of a complaint without the reason-to-believe determination required by section 5 of the FTC Act were subjected to judicial review, then other agencies would also be required to adhere to the terms of their organic acts, and "disruptive and dilatory litigation" would result (Commission brief, pp. 26 n. 15, 34 n. 18, 35 n. 21). The answer is two-fold. First, regulatory agencies should not issue complaints without a determination of reason to believe that there has been a violation of law (we are not aware that there is any widespread disregard of this principle), and a failure by an agency in that respect should be judicially corrected. Second, the seven-year history of pre-trial proceedings in Docket No. 8934 demonstrates that issuance of complaints

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[11]District judges are well able, with tools provided by Rules 11, 12, 16, 26(c) and 56 of the Federal Rules of Civil Procedure, to deal with any complaint by a respondent which fails to present a substantial showing of wrongful conduct by the Commission. Cf., *Medical Com. for Human Rts.* v. *Securities & Exch. Com'n* (D.C.Cir. 1970) 432 F.2d 659, 675, vacated as moot (1972) 404 U.S. 403; *Chattanooga Pharm. Ass'n* v. *United States Dept. of Justice* (6 Cir. 1966) 358 F.2d 834, 866.

without basis in investigation and evaluation of facts related to respondents creates more disruption than does adherence to the rule of law. After seven years, it cannot be said either when or how Docket No. 8934 can be brought to trial without an ineradicable taint of denial of due process of law, or how, in light of far-reaching changes in the petroleum world since the complaint issued, any public purpose could be served by an immensely costly and burdensome trial of hopelessly out-dated issues. The conduct of a proper investigation by the Commission before any complaint issues remains the practical and sensible, as well as the lawfully required, course of action. The Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures, January 22, 1979 (reprinted as Special Supplement to BNA ATRR, No. 897, Jan. 18, 1979), emphasized the importance in government cases of "greater use of pre-complaint investigations to produce well-organized, well-focused cases" (p. 18).

We do not at all suggest, as the Commission brief would have it (p. 46), that congressmen or Executive branch officials or members of the public may not express to the Commission interest in matters which may become the subject of a Commission complaint, and we are well aware that oil industry antitrust issues are matters of congressional interest. The showing made by Socal in this case, however, is not of a complaint supported by a Commission determination of reason to believe the law had been violated in an area in which there was congressional interest; Socal alleges that this complaint was issued without any fact evaluation in response to outcries over fuel oil and gasoline shortages.

Suppose the Commission's files contain a memorandum of a Commissioner saying, "We do not have anything to indicate that Socal has violated the law, but political pressure on the Commission is so strong that we are voting to issue the complaint anyway." The Commission's contention of absolute unreviewability would render such agency conduct immune from correction by the courts. Under the rule of law, an opportunity must be afforded to present such a document in a court of law.

B. The Commission's issuance of a complaint without a determination that Socal had violated the law is not agency action "committed to agency discretion by law."

The Commission's contention that its complaint issuance is entirely "committed to agency discretion by law" and unreviewable ignores the specific language of the APA, which precludes judicial review only *"to the extent that"* agency action is so committed (5 U.S.C. § 701). As the Court held in *Dunlop* v. *Bachowski* (1975) 421 U.S. 560, this exception prevents a court from "substitution of its judgment" for the Commission's judgment, but does not preclude a limited judicial review to insure that the Commission exercised its discretion on the facts (421 U.S. 572).

There is no statutory proscription of judicial review in the instant case. In such circumstances, the Commission "bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [its] decision" (*Dunlop* v. *Bachowski* (1975) 421 U.S. 560, 567). Judicial review will be cut off entirely "only upon a showing of 'clear and convincing evidence' " of legislative intent to do so (*Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136, 141). The Commission's brief

(pp. 30-31) points to no such clear and convincing evidence in the history of the Federal Trade Commission Act.[12]

In *Citizens to Preserve Overton Park* v. *Volpe* (1971) 401 U.S. 402, 410, the Court said that the committed-to-agency-discretion exception to judicial review of 5 U.S.C. § 701(a)(2) "is a very narrow exception" which applies only "in those rare instances where 'statutes are drawn in such broad terms that * * * there is no law to apply.'" Here as the Ninth Circuit held (J.A. 59), there is plainly law to apply under section 5 of the Federal Trade Commission Act,[13] in that the Commission must make an eval-

[12]The Commission asserts that "[t]he public interest determination has long been held unreviewable," citing *Hills Bros.* v. *Federal Trade Commission* (9 Cir. 1926) 9 F.2d 481, certiorari denied (1926) 270 U.S. 662, and that "[n]othing on the face of the statute suggests" that different considerations may relate to the "reason to believe" and the "public interest" requirements of section 5 (Commission brief, p. 27). This Court held in *Federal Trade Comm.* v. *Klesner* (1929) 280 U.S. 19, 30, that the public interest determination *is reviewable*, and stated that "the Commission's action in authorizing the filing of a complaint, like its action in making an order thereon, is subject to judicial review." And this Court held in *Fed. Trade Comm.* v. *Raladam Co.* (1931) 283 U.S. 643, 648-649, that the reason-to-believe determination is "a necessary prerequisite to the issue of a complaint," whereas the further finding of public interest derives from words which "are not substantive words of jurisdiction, but complementary words of limitation upon the jurisdiction conferred by the language immediately preceding."

[13]Section 13 of the Federal Trade Commission Act (15 U.S.C. § 53) provides that "[w]henever the Commission has reason to believe" that a person is violating the Act, it may upon a proper showing in district court obtain an injunction pending the trial of a Commission complaint. In *F.T.C.* v. *British Oxygen Co., Ltd.* (3 Cir. 1976) 529 F.2d 196, 199 *(en banc)*, the Third Circuit stated that "§ 13(b) requires that the Commission show the district court that it has 'reason to believe' a violation has occurred." The reason-to-believe requirement must afford "law to apply" under section 5 as well as under section 13.

uation of whether there is reason to believe that Socal violated the law and must not issue its complaint on the basis of impermissible political factors.[14] See, holding that in cases where political influence overrides the exercise of lawful discretion there is "law to apply," *Accardi* v. *Shaughnessy* (1954) 347 U.S. 260, 266-268; *D.C. Federation of Civic Associations* v. *Volpe* (D.C. Cir. 1972) 459 F.2d 1231, 1247-1248, certiorari denied (1972) 405 U.S. 1030; *Pillsbury Company* v. *F.T.C.* (5 Cir. 1966) 354 F.2d 952, 964.

The Commission asserts that "[a] comparison of this case with *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), underscores our contention that the issuance of the Commission's complaint is an exercise of prosecutorial discretion beyond the power of the courts to review" (Commission brief, p. 38). We suggest to the Court that the reverse is true, and that the Ninth Circuit correctly applied in this case the same standard for narrowly-drawn

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[14]The Commission brief cites (p. 26, n. 15) *Hahn* v. *Gottlieb* (1 Cir. 1970) 430 F.2d 1243, and two other circuit court opinions, for the contention that "[s]ome courts have employed a more pragmatic analysis" than this Court's test of "law to apply" in determining whether an agency determination is subject to review. Without agreeing that this Court's approach is any "less pragmatic," we note here that, contrary to Commission assertion, the reason-to-believe issue at hand fully meets the factors mentioned in the *Hahn* opinion: (1) courts deal every day with probable cause issues; (2) the limited review here directed will not impair the effectiveness of the Commission, but as this Court observed in *Dunlop* will "assure careful administrative consideration" of the action taken (421 U.S. 572); and (3) there is clear and traditional need for judicial supervision to preclude arbitrary Commission conduct damaging to respondents.

review of a decision regarding complaint issuance that this Court applied in *Dunlop*.

In *Dunlop,* the Court rejected the view that agency decisions on complaint issuance are immune from judicial review for any reason, and rejected the "all or nothing" approach to judicial review advanced by the Commission in the instant case.[15] The Court concluded that a decision by the Secretary of Labor not to file suit under the Labor-Management Reporting and Disclosure Act could be reviewed to insure that the Secretary had discharged his statutory duty to the plaintiff:

> "[C]ourts 'are necessarily [not] without power or jurisdiction . . . if it should clearly appear that the Secretary has acted in an arbitrary and capricious manner by ignoring the mandatory duty he owes to plaintiffs under the powers granted by the Congress. [citing authorities]' " (421 U.S. 568).

The Court proceeded to hold that a limited review of a particular complaint issuance decision was not inconsistent with the Secretary's general exercise of broad discretion to initiate proceedings, and served "to assure careful administrative consideration" of the action taken (421 U.S. 572). Thus, although "review may not extend

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[15]In *East Oakland-Fruitvale Planning Council* v. *Rumsfeld* (9 Cir. 1972) 471 F.2d 524, 533, the Ninth Circuit stated:

> "An 'all or nothing' approach to reviewability would, in specific cases, either be unfair to persons aggrieved by agency action, or impose an unwise burden upon the agency or the courts. Accordingly, separable issues appropriate for judicial determination are to be reviewed, though other aspects of the agency action may be committed to the agency's expertise and discretion."

to cognizance or trial of * * * the factual bases for the Secretary's conclusion," a court was required to "determine whether the Secretary's decision was reached for an impermissible reason or for no reason at all" (421 U.S. 573).

In this case, the Ninth Circuit applied precisely the narrowly-drawn standard of review articulated by this court in *Dunlop*: "we emphasize that review is limited" and "cannot extend to an assessment by the district court of what constitutes 'reason to believe'" but must determine "simply whether the FTC disregarded the mandate and restriction of 15 U.S.C. § 45(b) by not even making a 'reason to believe' determination at all" (J.A. 60).

In a strained effort to distinguish *Dunlop*, the Commission has tendered a singularly misleading version of what the Court did in that case (Commission brief, pp. 38-39). The Commission argues that the Court "adopted that portion of the Third Circuit's opinion" in *Dunlop* which held that "'the doctrine of prosecutorial discretion should be limited to those civil cases which, like criminal prosecutions, involve the vindication of societal or governmental interest, rather than the protection of individual rights,'" and then argues that *Dunlop* involved individual rights whereas this case involves a governmental interest. To the best of our reading of *Dunlop*, the Court did *not* adopt the opinion or reasoning of the Third Circuit, whose decision was reversed, but applied the same principle of narrow review applied by the Ninth Circuit in this case, and made no reference to the purported distinction between

public and private interests advanced by the Commission in this case.[16]

In his concurring opinion in *Dunlop,* Chief Justice Burger stated that "I join the opinion of the Court with the understanding that the Court has fashioned an exceedingly narrow scope of review of the Secretary's determination not to bring an action on behalf of a complainant to set aside an election" (421 U.S. 590). The same is true of the narrow scope of review of the Commission's reason-to-believe determination articulated by the Ninth Circuit in this case.[17]

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[16]In this connection, in the petition for certiorari and in the brief on the merits submitted on behalf of the Secretary of Labor in *Dunlop,* the Solicitor General expressly disavowed the Third Circuit's rationale; in his petition, the Solicitor General said that "this purported distinction is unpersuasive" (p. 11), and in his brief on the merits stated that "the policy of the LMRDA * * * is not to bestow benefits on individual complainants, but to vindicate the interest of the membership in democratic procedures and of the public at large in labor peace" (p. 31).

[17]In *Southern R. Co.* v. *Seaboard Allied Milling Corp.* (1979) 442 U.S. 444, 456 (cited in Commission brief, pp. 25, 26, 37), the Court distinguished the permissive language of section 15(8)(a) of the Interstate Commerce Act, which it held did not create a reviewable duty, from the mandatory language ("shall") of section 13(1) of the Act, which creates a reviewable duty. The mandatory language of section 13(1) is the analog of that in section 5 of the FTC Act: the Commission *"shall"* have reason to believe that a violation of the Act has occurred before issuing a complaint.

Moreover, in both *Southern R.*, 442 U.S. 454, and *Morris* v. *Gressette* (1977) 432 U.S. 491, 505 (also cited in Commission brief, pp. 25, 37), the Court's decision rested significantly on the fact that other avenues of judicial review were available to aggrieved parties. In the instant case, Socal has no other way to obtain review of the Commission's unlawful failure to comply with its organic act (see pp. 38-47, infra).

Moreover, the "individual rights" of Socal are obviously implicated by the Commission's failure to comply with a condition of its organic act which is designed to prevent unfounded proceedings and harassment of respondents. The circumstances at bar present a stronger case for judicial review than those in *Dunlop,* where review of an agency determination *not* to issue a complaint was upheld. While the Commission asserts that "[t]here is no reason for a different standard when a complaint is issued, rather than refused" (Commission brief, p. 39), there is in fact substantial reason for granting review when a respondent is charged with wrongdoing without any determination of a basis therefor, even if review were to be denied of a Commission determination not to proceed (an issue not before the Court).[18]

In *Marshall* v. *Jerrico, Inc.* (1980) ..... U.S. ....., 100 S.Ct. 1610, citing *Dunlop* and other authorities this Court made a unanimous restatement of the rule that administra-

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[18]In *United States* v. *Falk* (7 Cir. 1973) 479 F.2d 616, 620 *(en banc)*, the court held that the defendant was entitled to an evidentiary hearing on allegations "sufficient to raise a reasonable doubt" that his prosecution had been instituted for an improper purpose, and stated that prosecutorial discretion "does not mean that a criminal defendant is never to be afforded an opportunity to prove that the prosecution stems from an improper prosecutorial design." In the comment Curbing the Prosecutor's Discretion, *United States* v. *Falk,* 9 Harv.Civil Rights Civil Liberties L.Rev. (1974) 372, 377, it was pointed out that:

> "A federal prosecutor does not have discretion to bring charges against a person he knows to be innocent or withhold prosecution against a close relative he knows to be guilty. Moreover, even if it were proper to allow broad discretion not to bring charges, *the arguments for review are far stronger where an individual is singled out*" (emphasis supplied).

tive enforcement decisions which were motivated by improper factors or otherwise contrary to law are not immune from judicial review. The Court observed:

> "Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, see *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 793 (1973), and similar considerations have been found applicable to administrative prosecutors as well, see *Moog Industries, Inc.* v *FTC*, 355 U.S. 411, 414, 78 S.Ct. 377, 380, 2 L.Ed.2d 370 (1958); *Vaca* v. *Sipes*, 386 U.S. 171, 182, 87 S.Ct. 903, 912, 17 L.Ed.2d 842 (1967)" (100 S.Ct. 1616).

And the Court then stated:

> "In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law. See *Dunlop* v. *Bachowski*, 421 U.S. 560, 567, n. 7, 568-574, 95 S.Ct. 1851, 1858, n. 7, 1858-1861, 44 L.Ed.2d 377 (1975); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147 (1939). Moveover, the decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. Cf. 2 K. Davis, Administrative Law Treatise 215-256 (2d. ed. 1979)" (100 S.Ct. 1616-1617).

C. The Commission's "mental processes" are not endangered by the instant case, and in no event does the law prohibit an examination into the process of administrative determination where there is a showing of irregularity.

The Commission's assertion that the narrow review specified by the Ninth Circuit in the instant case "would require an unjustified inquiry into the Commissioners' mental processes" (Commission brief, p. 44; also, pp. 14, 24) is erroneous for two reasons.

First, it disregards the scope of the review. As the Ninth Circuit stated, "that review is limited" and "cannot extend to an assessment by the district court of what constitutes 'reason to believe' but simply whether the FTC disregarded the mandate and restriction of 15 U.S.C. § 45(b) by not even making a 'reason to believe' determination at all" (J.A. 60). The decision below explicitly rejected the proposition that courts involve themselves in weighing the *quality* of Commission reason-to-believe determinations, but insisted that courts cannot abdicate their responsibility to review in a proper case whether the Commission actually made a reason-to-believe determination to support the issuance of a complaint. As heretofore observed (p. 17, supra), the circumstances of the case at hand are distinctly different from those of *United States* v. *Morgan* (1941) 313 U.S. 409, 422 (cited in Commission brief, pp. 24, 44).

Second, the mental processes of agency officials are not sacrosanct. The presumption of administrative regularity normally precludes inquiry into the process of a Commission determination, but the presumption is not irrebuttable as the Commission's brief implies. Numerous decisions establish that where, as in the case at bar, a plaintiff makes

a prima facie showing of failure to discharge a statutory duty, a court may and should permit the inquiry necessary to resolve a claim of administrative failure to adhere to the rule of law:

> "[T]he mental process rule [of the *Morgan* case] is but 'one facet of the general presumption of regularity' which attaches to decisions of administrative bodies [citing authority]. Thus, we conclude, where a prima facie case of misconduct is shown, justice requires that the mental process rule be held inapplicable [citing authority]" (*Singer Sewing Machine Company* v. *N.L.R.B.* (4 Cir. 1964) 219 F.2d 200, 208).[19]

The district courts have ample power to control discovery and to avoid *unnecessary* probing of the Commission's deliberative process.

In *Citizens to Preserve Overton Park* v. *Volpe* (1971) 401 U.S. 402, 420, the Court affirmed that a court "may require the administrative officials who participated in the decision to give testimony explaining their action," and that, although "inquiry into the mental processes of administrative decision-makers is usually to be avoided," it may and should be allowed upon a showing of irregularity,

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[19]Accord, see, e.g., *United States* v. *Nixon* (1974) 418 U.S. 683, 706, 709; *D.C. Federation of Civic Associations* v. *Volpe* (D.C.Cir. 1972) 459 F.2d 1231, 1248, certiorari denied (1972) 405 U.S. 1030; *Sun Oil Company* v. *United States* (Ct.Cl. 1975) 514 F.2d 1020, 1024-1025; *KFC National Management Corp.* v. *N.L.R.B.* (2 Cir. 1974) 497 F.2d 298, 305; *Committee for Nuclear Responsibility, Inc.* v. *Seaborg* (D.C.Cir. 1971) 463 F.2d 788; *Peoples* v. *United States Department of Agriculture* (D.C.Cir. 1970) 427 F.2d 561, 567; *Bank of Dearborn* v. *Saxon* (E.D.Mich. 1965) 244 F.Supp. 394, affirmed (6 Cir. 1967) 377 F.2d 496.

even where there are "administrative findings."[20] In *Dunlop* v. *Bachowski* (1975) 421 U.S. 560, the Court likewise recognized that, absent any showing of irregularity, a statement by the Secretary of Labor of his reasons for refusing to issue a complaint would be sufficient for judicial review, but that the unusual case involving evidence that the Secretary's "decision would be 'plainly beyond the bounds of the Act [or] clearly defiant of the Act'" would be "a matter of grave public concern" justifying further judicial inquiry (p. 574). In the instant case, Socal's allegations, which the Ninth Circuit held supported a reasonable inference that the Commission had violated its statutory mandate by failing to make a reason-to-believe determination, stand admitted on motion to dismiss the complaint.[21]

D. The Commission's issuance of the complaint in Docket No. 8934 and its order denying Socal's motion for withdrawal of the complaint constitute "agency action."

The Commission attempts to revive, as the initial contention in its brief, the argument that the Commission's issu-

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[20]As previously pointed out (p. 16, supra), the Commission erroneously contends that "the allegations in the administrative complaint constitute the Commission's 'findings' that there is 'reason to believe'" (Commission brief, p. 45), thus confusing allegations with facts and *recitals* with findings. Socal's claim is that the recital of reason to believe in the complaint in Docket No. 8934 is a bare recital, and that the Commission did not make any genuine determination or finding of reason to believe at all.

[21]The Commission argues that Socal's claim fails to show "that the Commission issued its complaint under compulsion or duress" (Commission brief, p. 46). The applicable law is not cast in terms of "compulsion" or "duress." It is cast in terms that an agency may not act on the basis of arbitrary factors not related to violation of law by a respondent or upon "considerations that Congress could not have intended to make relevant" (Judge Learned Hand in *United States* v. *Shaughnessy* (2 Cir. 1950) 180 F.2d 489, 491).

ance of an antitrust complaint under section 5 of the FTC Act does not constitute "agency action" within the APA.[22] The Commission tendered this argument to the Ninth Circuit, which disposed of it concisely and in the pragmatic spirit of the APA review provisions:

> "The language of § 551(13) admits of the interpretation that the subsection is illustrative rather than exclusive. Moreover, Congress has manifested its intent that the APA cover a 'broad spectrum of administrative actions.' *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)" (J.A. 56).

The purpose of the judicial review provisions of the APA —which incorporated and elaborated the existing common law—is to protect the substantial rights of persons exposed to agency proceedings and to require agencies to conduct themselves in accordance with statutory limitations and due process of law. Courts are properly skeptical of claims of immunity from judicial review for agency action that has serious practical consequences. Judicial review is afforded by the common law for agency conduct that is "in excess of its delegated powers and contrary to a specific prohibition" in its enabling act (*Leedom* v. *Kyne* (1958) 358 U.S. 184, 188). The APA "reinforced" earlier modes of review and was "designed to give an additional remedy and not to cut down more traditional channels of review" (*Abbott*

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[22]The Commission's petition for certiorari made no reference to the point. The Commission changed the question as it is stated in the petition—whether the complaint issuance was "a matter 'committed to agency discretion by law'" (Pet., p. 2)—to the question as it is stated in the Commission's brief—whether the complaint issuance was "'agency action * * * committed to agency discretion by law'" (Commission brief, p. 2).

Laboratories v. *Gardner* (1967) 387 U.S. 136, 140, 142; see also *School of Magnetic Healing* v. *McAnnulty* (1902) 187 U.S. 94, 108, and *Deering Milliken, Inc.* v. *Johnston* (4 Cir. 1961) 295 F.2d 856, 861, 863). Pursuant to the traditional judicial power to review agency conduct that "violated express statutory conditions of its authority," the issuance of complaints by the Federal Trade Commission was held subject to judicial review in *Elmo Division of Drive-X Company* v. *Dixon* (D.C.Cir. 1965) 348 F.2d 342, 344-345, and *Jewel Companies, Inc.* v. *F.T.C.* (7 Cir. 1970) 432 F.2d 1155, 1158-1159.

The review provisions of the APA are thus not to be given a narrow parsing that might be appropriate to an IRS regulation, but are to receive a pragmatic and hospitable interpretation appropriate to a broad charter for judicial review. The Legislative History of the Administrative Procedure Act (Senate Document No. 248, 79th Cong., 2d Sess. (1946)) shows that both the Senate and the House Judiciary Committee Reports said (pp. 197-198, 255) that the definition of "agency action" is intended to

> "assure the complete coverage of every form of agency power, proceeding, action or inaction."

In *Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136, 140-141, the Court said:

> "The legislative material elucidating that seminal act [the APA] manifests a Congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable interpretation' [citing cases]."

In *Independent Broker-Deal. T. Ass'n* v. *Securities & E. Com'n* (D.C.Cir. 1971) 442 F.2d 132, the court rejected the SEC's argument that its involvement in the elimination of "give-ups" by the New York Stock Exchange did not constitute "agency action" within the APA:

> "If linguistic technicalities are honored, and the practicalities of administrative involvement ignored, we will have in truth unleashed a 'monster which rules with no practical limits on its discretion' " (422 F.2d 141).

As the Ninth Circuit pointed out in this case, the definition of "agency action" in the APA is illustrative rather than exclusive. The definition *"includes"* the whole or a part of a "rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act" (5 U.S.C. § 551 (13)). The verb "include" does not mean "limited to." Webster's Unabridged Third International Dictionary defines "include" to mean "to place, list, or rate as a part or component of a whole or of a larger group, class or aggregate."

Nor has the Commission acknowledged the *order* it entered which denied Socal's motion for withdrawal of the complaint (J.A. 47-49), and "order" is one of the terms expressly listed in the definition of "agency action" (5 U.S.C. § 551(6) and (13)).

The Commission cites *Gifford-Hill & Company, Inc.* v. *F.T.C.* (D.C.Cir. 1975) 523 F.2d 730, 732, as concluding that "the decision to institute an adjudicatory proceeding is not an 'agency action' " (Commission brief, pp. 20-21). This is a classic example of quoting out of context. In *Gifford-Hill*,

plaintiff claimed that the Commission could not initiate a divestiture proceeding against it without preparing an environmental impact statement under provisions of the National Environmental Policy Act (NEPA). Pointing out that it was the final order in a Commission proceeding that could have environmental impact, and not the filing of the complaint, the court held that plaintiff lacked standing to challenge issuance of the Commission complaint on that ground, citing the APA provision that "[a] person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action" should have access to judicial review. The court did *not* hold that issuance of a Commission complaint is not "agency action" reviewable under the APA, as the Commission's brief suggests, but that complaint issuance is not an agency action which aggrieves a respondent *in the sense of violating NEPA.*

Under the authorities we have cited (pp. 18-19, 24-26, 34-35, supra), the unlawful issuance of a complaint by the Commission clearly does legal wrong to and aggrieves the respondent. This Court has just stated in *Marshall* v. *Jerrico, Inc.* (1980) ..... U.S. ....., 100 S.Ct. 1610, 1617, that "the decision to enforce * * * may itself result in significant burdens on a defendant."

The Commission's citation of *ITT* v. *Electrical Workers* (1975) 419 U.S. 428 (Commission brief, pp. 19, 22) is equally inapposite. The issue in *Electrical Workers* was not whether an agency decision to issue a complaint constituted an "agency action," but whether informal proceedings of the NLRB under section 10(k) of the National Labor Relations Act constituted an "adjudication" under section 551 of the APA that invoked the procedural safeguards of

section 554. The Court held that "the 10(k) determination is not itself a 'final disposition' within the meaning of 'order' and 'adjudication'" in section 551 of the APA (p. 444).

Here, the question is not whether the Commission's complaint issuance process is an "adjudication," which it obviously is not, but whether the Commission may subject a respondent to the burdens of an antitrust proceeding without making the reason-to-believe determination required by its organic act.[23]

II. SOCAL HAS NO AVENUE OF JUDICIAL REVIEW EXCEPT ITS SUIT IN DISTRICT COURT.

The Commission's contention that its complaint issuance in Docket No. 8934 and its order refusing to withdraw the complaint and denying Socal any discovery or hearing on

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[23]The remaining cases cited by the Commission on the "agency action" point (Commission brief, pp. 18-19 and n. 12) are wholly out of point of the instant case. *Hearst Radio* v. *Federal Communications Commission* (D.C.Cir. 1948) 167 F.2d 225, *Pharmaceutical Manufacturers Ass'n* v. *Kennedy* (D.Md. 1979) 471 F.Supp. 1224, and *In re FTC Corporate Patterns Report Litigation* (D.D.C. 1977) 1977-2 Trade Cases ¶ 61,544, all involved challenges to the gathering and dissemination of information by agencies. *Fed. Power Comm'n* v. *Edison Co.* (1938) 304 U.S. 375 and *United States* v. *Los Angeles R.R.* (1927) 273 U.S. 299 also involved agency information gathering. Nothing in the case at bar affords any meaningful parallel with inspection of retail store decorations (*Nat. Orn. & El. Lt. Xmas Ass'n* v. *Con. Prod. Saf. Com'n* (2 Cir. 1975) 526 F.2d 1368); informal discussions between the FCC and a telephone company (*Public Utilities Com'n of State of Cal.* v. *United States* (9 Cir. 1966) 356 F.2d 236); non-binding recommendations against expansion of recreation facilities (*Friends of Yosemite* v. *Frizzell* (N.D.Cal. 1976) 420 F.Supp. 390); or environmental effects from spraying of weedkiller (*People for Environmental Progress* v. *Leisz* (C.D.Cal. 1974) 373 F.Supp. 589).

the reason-to-believe issue do not constitute "final agency action" subject to judicial review disregards the Court's admonitions that the "generous" review provisions of the APA must be given a "hospitable interpretation," and that "[t]he cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way" (*Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136, 149). "[T]he core principle [is] that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost" (*Mathews* v. *Eldridge* (1976) 424 U.S. 319, 331, n. 11; cf. *Cohen* v. *Beneficial Loan Corp.* (1949) 337 U.S. 541, 546).

The Administrative Procedure Act specifies that agency action "subject to judicial review" includes "final agency action for which there is no other adequate remedy in a court" (5 U.S.C. § 704). The legislative history of the Act makes clear that this language was to receive a practical construction:

> "The Committee on the Judiciary of both the House and the Senate included in their reports a statement that 'final action includes any effective agency action for which there is no other adequate remedy in any court' * * *. We thus construe 'final action' as used in § 10(c) of the Administrative Procedure Act [5 U.S.C. § 704] * * * to mean what the Committee said it meant" (*Deering Milliken, Inc.* v. *Johnston* (4 Cir. 1961) 295 F.2d 856, 865-866).[24]

[24]In *Deering Milliken*, Chief Judge Haynsworth affirmed an injunction against an interlocutory remand order of the NLRB found to be in violation of section 6(a) of the APA which requires the agency to "proceed with reasonable dispatch to conclude any matter presented to it." Plaintiff's claim of unlawful delay could not be remedied on review of a final order in the proceeding. Socal similarly has no other adequate remedy to vindicate its claim.

In the instant case, Socal has no avenue to obtain judicial review of the Commission's unlawful conduct other than its suit in the district court. The Commission's ambivalent suggestion that Socal might be able to obtain review of its contention that the complaint was unlawfully issued upon final review of the cease and desist order that may ultimately be entered in Docket No. 8934 a decade or more in the future (Commission brief, pp. 55-56) is incorrect both as a practical matter and as a legal matter.

As a practical matter, it is preposterous to suggest that a court of appeals, a decade or more hence, after entry of a cease and desist order in a massive Commission proceeding, would vacate the order even though it was supported by substantial evidence and remand the case for further proceedings to determine whether the Commission had adhered to a statutory requirement when it issued the complaint back in 1973. The Commission acknowledges this but asserts: "The mere possibility that an issue might not be reviewable at a later stage is not sufficient reason to justify interlocutory review" (Commission brief, p. 55). And the Commission in a footnote says, "we submit that a cease and desist order supported by sufficient evidence of a violation is not subject to challenge on the ground that the Commission failed to make a 'reason to believe' determination at the outset of the proceeding" (Commission brief, p. 40, n. 26). That bold assertion of a Commission prerogative to issue a complaint without any factual basis and for any vindictive reason it might choose, beyond correction by any court at any time, is not and should not be the law in the United States.

As a legal matter, section 5(c) of the FTC Act (15 U.S.C. § 45(c)) provides that the court of appeals shall review the Commission's cease and desist order and that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." The courts of appeals have accordingly held that on review of a cease and desist order, the question before them is whether the order is supported by substantial evidence, not whether there was lawful basis for issuance of the complaint in the first instance (*Jewel Companies, Inc.* v. *F.T.C.* (7 Cir. 1970) 432 F.2d 1155; *Elmo Division of Drive-X Company* v. *Dixon* (D.C.Cir. 1965) 348 F.2d 342, 344 ("[t]he prospect of ultimate appellate review of any final order issuing out of the new complaint proceeding is not adequate. The type of procedural error appellant asserts is not of a kind which affects the Commission's substantive findings")).[25] In *Jewel Companies,* supra, the court held that appellate review of a Commission cease and desist order was not an adequate remedy for a claim that a Commission complaint had been invalidly issued upon the irregular vote of one Commissioner:

> "If the question of the Commissioner's obligation is postponed until final appeal of a Commission order,

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[25]See Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals, 88 Harv.L.Rev. (1975) 980, 986, n. 39, citing *Jewel Companies* and *Elmo Division* in support of the statement that "there are occasions when orders that are formally part of an ongoing proceeding should be made immediately reviewable;" for example, "direct review of the agency's complaint initiation procedures may be had if later review would be incapable of providing a remedy," noting specifically that statutory review in the court of appeals under the FTC Act is directed to the final cease and desist order (p. 988).

> *the standard of review will be different. At that point the court of appeals would only decide whether the final order is supported by the evidence and would not question the authority of the Commission in issuing the complaint.* As in *Skinner & Eddy* [*Skinner & Eddy Corp.* v. *United States* (1919) 249 U.S. 557], 'the so-called administrative remedy was without relevance to the plaintiff's claim' " (432 F.2d 1159, emphasis supplied).

The Commission's argument that heavy expenses of exhausting an administrative remedy will not justify *pre-exhaustion* judicial review, and its reliance on the statement in *Myers* v. *Bethlehem Corp.* (1938) 303 U.S. 41 (Commission brief, p. 49) that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted," and cases applying that familiar principle (Commission brief, pp. 52-53), are misplaced in present circumstances. Those cases hold that the agency must be afforded the opportunity to make determinations before judicial review is available.[26] Here, the Commission has asserted that its deter-

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[26]Cf., *Leedom* v. *Kyne* (1958) 358 U.S. 184, 188, where the Court held that the district court had jurisdiction to review an NLRB order which certified a bargaining unit including professional employees in violation of a statutory requirement to determine whether a majority of professional employees would vote for inclusion in the unit, despite the general rule of *A. F. of L.* v. *Labor Board* (1940) 308 U.S. 401, that an NLRB certification order is not subject to direct judicial review:

> "This suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act."

mination of reason to believe was made before the complaint issued, has denied Socal's motion for withdrawal of the complaint, and has denied Socal any discovery on the issue and stated that the question is neither open for consideration in hearings in the case nor subject to review in any court at any time (J.A. 47-49).[27]

The reviewability in district court of the Commission's failure to make the statutorily required reason-to-believe determination, which is "a necessary prerequisite to the issue of a complaint" (*Fed. Trade Comm.* v. *Raladam Co.* (1931) 283 U.S. 643, 649) and a determination *anterior to* commencement of the proceeding, is further supported by decisions permitting review of analogous issues under 28 U.S.C. § 1291. In *Cohen* v. *Beneficial Loan Corp.* (1949) 337 U.S. 541, the Court held that the requirement of secur-

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[27]While the Commission's order (J.A. 47-49) avers that its reason-to-believe determination is not open to judicial review, its brief in this Court also suggests that, if it is, then "like any other preliminary ruling preserved in the administrative proceeding, [it] may be reviewed in connection with any cease and desist order ultimately issued by the Commission," citing section 704 of the APA (Commission brief, pp. 55-56). That alternate suggestion ignores the scope of statutory review in the court of appeals, which is to determine whether there is evidence to support the Commission's findings (see pp. 41-42, supra). Nor is it any answer to suggest that on review of a cease and desist order the court of appeals can solve the absence of any record on the reason-to-believe issue by remanding the case for "supplementation of the record" (Commission brief, p. 55). In *Dolcin Corp.* v. *FTC* (D.C.Cir. 1955) 219 F.2d 742, 750-752, certiorari denied (1955) 348 U.S. 981, relied upon by the Commission for the notion that the record can readily be supplemented a decade or more hereafter, the respondent had the evidence in question—a clinical test—in its own possession. Socal would have no evidence on the unlawful complaint issuance because the Commission has foreclosed that inquiry from hearings in Docket No. 8934.

ity as a condition to the initiation of a stockholder's derivative action was appealable as a "final decision" under 28 U.S.C. § 1291. Justice Jackson stated for the Court:

> "The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. * * * But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.
>
> "Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. * * * But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. * * *
>
> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction" (p. 546).

As previously noted (p. 39, supra), the Court has applied the same principles to review of agency action under the APA (*Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136,

149; *Mathews* v. *Eldridge* (1976) 424 U. S. 319, 331, n. 11, citing *Cohen*).[28]

In *Abney* v. *United States* (1977) 431 U.S. 651, the Court applied *Cohen* doctrine to review as a "final decision" a district court order which refused to dismiss an indictment on grounds of double jeopardy. Chief Justice Burger, speaking for the Court, quoted extensively from *Cohen* (pp. 658-659), further quoted from Justice Jackson's separate opinion in *Stack* v. *Boyle* (1951) 341 U.S. 1, 12, that "[w]hile a final judgment always is a final decision, there are instances in which a final decision is not a final judgment" (p. 658), and then stated:

> "* * * [T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i. e.*, whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. * * * Rather, he is contesting the very authority of the Government to

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[28]See also, *Mercantile Nat. Bank* v. *Langdeau* (1963) 371 U.S. 555, 558, in which the Court reviewed under 28 U.S.C. § 1257 a state court order on venue under the Federal statute regulating proceedings against national banks:

> "This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings."

hale him into court to face trial on the charge against him" (pp. 659-660).

Respondent in the case at bar similarly is "contesting the very authority of the Government to hale him into court to face trial on the charge against him." Socal's claim is that the Commission failed to make a reason-to-believe determination which is requisite to and anterior to the issuance of a Commission complaint; Socal is not challenging whether the allegations state a claim for relief on their face nor the ultimate merits of the purported charge.

Still more precisely in point is the decision of the Ninth Circuit in *United States* v. *Griffin* (9 Cir. 1980) 617 F.2d 1342 in which defendant appealed from a district court order denying his motion to dismiss the indictment on grounds of vindictive prosecution. The Ninth Circuit held the order appealable under *Cohen* and *Abney,* pointed out that "all the facts relevant to the vindictive prosecution claim will be apparent and known to the parties prior to trial" and that "[n]o further purpose can be served by postponing a determination of the issue," and stated:

> "* * * [T]he vindictive prosecution doctrine is a limit on prosecutorial discretion, and goes to the very authority of the prosecution to hale the defendant into court in the first place. [citing authority] Obviously, this right would be irreparably lost if appellate review had to await the final outcome at trial. As recognized in *Abney,* an integral part of the process of defending oneself in a criminal prosecution is the 'personal strain, public embarrassment, and expense' which inevitably results. * * *

> "In holding that the order of the district court is immediately appealable under 28 U.S.C. § 1291, we do not agree with appellee's contention that such a decision will open the floodgates of interlocutory appeals of due process claims. Freedom from vindictive prosecution is a meaningful right only if it protects against being brought into court to defend against the charges" (pp. 1345-1346).

Socal's claim that the complaint in Docket No. 8934 issued for impermissible political reason and without the statutorily required determination of reason to believe that Socal had violated section 5 of the FTC Act is subject to review in district court. If review in district court were denied, Socal's statutory right would be irreparably lost, not only because review of the issue would not be available on ultimate review of a cease and desist order in the court of appeals a decade or more hereafter, but also because such ultimate review, even if theoretically available, could not remedy the injury to Socal in being unlawfully haled into Commission proceedings in the first instance.

CONCLUSION

The decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

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